

FEB 6 1978

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IN THE

Supreme Court of the United States

October Term 1977

No. 77-987

C. JOHN FORGE, JR., JAMES OLSON,
RICHARD C. LARSON,

Appellants,

vs.

STATE OF MINNESOTA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

MOTION TO DISMISS OR AFFIRM

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Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Supreme Court of the State of Minnesota on the ground that the question presented is so unsubstantial as not to warrant further argument.

OPINION BELOW

The Opinion of the Minnesota Supreme Court (*State v. Forge, et al.* Nos. 46473, 46478 and 46479 (filed October 14, 1977)), is not yet reported, but it is reproduced at pages 85a to 91a of Appellants' Joint Jurisdictional Statement. Neither the Findings of Fact and Conclusions of Law nor the Memorandum of the District Court, 9th Judicial District, Minnesota, is reported. However, the former document is reproduced as an appendix hereto (pp. A-1 to A-3), and the latter is set forth as an appendix to Appellants' Joint Jurisdictional Statement (pp. 1a-83a).

JURISDICTION

Appellants invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(1) and (2), but their arguments relate entirely to subparagraph (2).

QUESTION PRESENTED

If a federal district court has determined that pursuant to treaties and other federal law members of a particular tribe of Indians may hunt, trap, fish and gather wild rice free of state regulation, may the state, consistent with the requirements of equal protection, legislatively recognize that right and attempt to assure that the tribe will regulate the exercise of the right by its members in a manner consistent with the interests of all the citizens of the state?

STATUTE INVOLVED

This appeal questions the validity of Minnesota Statutes, Section 97.431 (1976), which reads as follows:¹

97.431 INDIAN RESERVATIONS; SPECIAL PROVISIONS RELATING TO HUNTING, FISHING, TRAPPING AND WILD RICE RIGHTS OF INDIANS. Subdivision 1. Purpose. The purpose of this section is to give recognition and effect to the rights of the Leech Lake Band of Chippewa Indians which are preserved by federal treaty and which relate to hunting, fishing, and trapping, and to the gathering of wild rice on the Leech Lake Indian reservation. These rights have been recognized and given effect by the decision of the United States District Court in the following entitled actions: Leech Lake Band of Chippewa Indians, et al. v. Robert L. Herbst, No. 3-69 Civ. 65; and United States of America v. State of Minnesota, No. 3-70 Civ. 228. The state of Minnesota desires to settle all outstanding issues and claims relating to the above rights.

Subd. 2. Definitions. For the purposes of this section the following terms have the meanings given them:

- (a) "Band" means the Leech Lake Band of Chippewa Indians;
- (b) "Committee" means the reservation business committee of the Leech Lake Band of Chippewa Indians;
- (c) "Reservation" means the Leech Lake reservation as described in the settlement agreement;

¹ Appellants incorrectly describe Minnesota Statutes as "Minnesota Revised Statutes," refer to Volume 8A, which is in the unofficial Minnesota Statutes Annotated, and then proceed to quote Laws of Minnesota 1973, Chapter 124, Section 1. All references herein will be to the act as codified in Minnesota Statutes.

(d) "Settlement agreement" means the document entitled "Agreement and Settlement" on file and of record in the United States District Court for the District of Minnesota, Third Division, in the following entitled actions: Leech Lake Band of Chippewa Indians, et al. v. Robert L. Herbst, No. 3-69 Civ. 65; and United States of America v. State of Minnesota, No. 3-70 Civ. 228.

Subd. 3. Ratification of settlement agreement. Notwithstanding the provisions of any other law to the contrary, the state of Minnesota by this section ratifies and affirms the agreement set forth in the settlement agreement.

Subd. 4. Commissioner's powers and duties. Notwithstanding the provisions of any other law to the contrary, the commissioner of natural resources, on behalf of the state of Minnesota, shall take all actions, by order or otherwise, which are necessary to carry out the duties and obligations of the state of Minnesota arising from the agreement entered into by the parties to the settlement agreement. These actions include but are not limited to the following:

(a) The implementation of the exemption of members of the band and other members of the Minnesota Chippewa tribe from state laws relating to hunting, fishing, trapping, the taking of minnows and other bait, and the gathering of wild rice while within the reservation, together with exemption from related possession and transportation laws, to the extent necessary to effectuate the terms of the settlement agreement;

(b) The establishment of a system of special licenses and related license fees for persons who are not members of the Minnesota Chippewa tribe for the privilege of

hunting, fishing, trapping, or taking minnows and other bait, within the reservation. All money collected by the commissioner for special licenses shall be deposited in the state treasury and credited to the Leech Lake Band special license account, which is hereby created. All money in the state treasury credited to the Leech Lake Band special license account, less any deductions for administrative costs authorized by the terms of the settlement agreement, is appropriated to the commissioner who shall remit the money to the committee pursuant to the terms of the settlement agreement;

(c) To the extent necessary to effectuate the terms of the settlement agreement, the promulgation of regulations for the harvesting of wild rice within the reservation by non-Indians;

(d) To the extent necessary to effectuate the terms of the settlement agreement, the establishment of policies and procedures for the enforcement by conservation officers of the conservation code adopted by the band; and

(e) The arbitration of disputes arising under the terms of the settlement agreement.

The settlement agreement specifically ratified and affirmed by Minnesota Statutes, Section 97.431, Subdivision 3 (1976), as set out at pages 98a to 117a of Appellants' Joint Jurisdictional Statement contains several errors. In the interests of brevity only those parts of the agreement containing the errors are repeated here, with corrections.

Article III, *Term* should read as follows:

III.

Term

A. This Agreement shall be binding upon the parties so long as there continues to be a Reservation and/or tribal and Band hunting, fishing and ricing rights, recognizing that termination of the Reservation and/or tribal and Band hunting, fishing and ricing rights may only be accomplished by action of the United States Congress expressly stating that the Reservation and/or all hunting, fishing and ricing rights of the tribe or Band are terminated.

B. In the event there is a final judgment of the United States Supreme Court or a Federal Appellate Court of competent jurisdiction in which the Band or the Tribe is a party holding that the treaties and statutes construed in the litigation referred to above do not reserve to or confer upon the Minnesota Chippewa Tribe or the Band any rights to hunt, fish, trap and gather wild rice upon public lands and waters other than those generally provided under Minnesota law to all persons then this agreement shall terminate.

C. Should the Congressional action referred to in paragraph A above occur or the judicial decision referred to in paragraph B above be rendered, then any of the parties hereto may apply to the United States District Court for the District of Minnesota for vacation of the consent decree provided for in Section II of this Agreement. If an application for vacation of the consent decree is based on the occurrence of the events described in paragraph B above, the parties shall also request the entry of a fresh original judgment from which an appeal may be taken.

Article IV, *Agreements*, paragraph A, should read as follows:

IV.

Agreements

A. The Band will adopt and uniformly and fairly enforce the Code upon all of its members and Tribal members duly licensed pursuant to the Code. The Code shall only apply to Band and Tribal members. The Band or the Tribe shall have no jurisdiction over non members of the Band or Tribe. Said non members shall at all times remain subject to State law only except as otherwise provided by Federal law. All Band and licensed Tribal members shall be exempt from State law governing hunting, fishing, trapping or ricing while within the Reservation, except for the offense of trespass relating to privately owned land which has been posted pursuant to Minnesota Statutes 1971 §100.29 (21), and in lieu thereof shall be subject to the Code. All Band and Tribal members shall be exempt from State law governing the possession and transportation anywhere within the State of game, game fish, non game fish and wild rice which has been taken within the Reservation. The Code shall not be modified, amended or altered except by agreement of each of the parties hereto or as provided herein, and in no event shall the Band or Tribe permit the commercial taking or sale of game fish or game.

Article IV, *Agreements*, paragraph B.2.b., should read as follows:

2. Wild Ricing Regulation

* * *

b. The RBC shall adopt and shall recommend to the Commissioner for adoption appropriate regulations to control:

- (i) Methods of harvesting,
- (ii) Seasons of harvesting,
- (iii) The number of persons permitted to harvest, by requiring the issuance of Band permits to all persons entitled to harvest wild rice, whether or not Band or Tribal members,
- (iv) The lakes and rivers or portions of lakes and rivers open to ricing, and
- (v) Licensing of buyers.

The Commissioner shall promulgate regulations consistent with the regulations adopted and recommended by the RBC for the purpose of regulating and licensing persons entitled to harvest wild rice within the Reservation, save and except that no regulation, limitation or license fee recommended by the Band may be adopted or imposed which will discriminate against or among those otherwise entitled to harvest wild rice or buy the same within the Reservation.

Article VI, *Arbitration*, paragraph A, should read as follows:

VI.

Arbitration

A. Any dispute or disagreement between the parties, including specifically but not exclusively:

- 1. Fair Enforcement of the Code,
- 2. Modifications of the Code as provided therein,
- 3. Game or fish management,
- 4. Protection of endangered species, and

5. Administration and sale of licenses, shall be settled by arbitration at the request of any party hereto. In any such arbitration, the State shall be considered as one party, and the Band, the United States and the Minnesota Chippewa Tribe shall be the other party, although the Band, the United States and the Minnesota Chippewa Tribe need not act unanimously in any matter other than selection of the arbitrators, and each may demand arbitration of any dispute with the State pursuant to this section without the consent of the others.

The party desiring to initiate arbitration shall serve on the other party, by certified mail (return receipt requested) a written demand for arbitration setting forth (a) the nature of the dispute to be resolved, (b) the claim of the party initiating arbitration with respect to such dispute, and (c) the name and address of one arbitrator selected by the party initiating arbitration. The other party shall have ten days after receipt of such demand to select a second arbitrator. If no second arbitrator is selected within such ten-day period, then the sole arbitrator shall be the one selected by the party initiating arbitration. If within such ten-day period the party receiving the demand for arbitration selects a second arbitrator by giving written notice of the arbitrator's name and address to the party initiating arbitration and to the first arbitrator by certified mail, then the two arbitrators so selected shall choose a third arbitrator within ten days after the receipt by the first arbitrator of notice of the selection of the second arbitrator. If the first two arbitrators fail to choose a third arbitrator within the prescribed ten-day period, then either party to the arbitration, on notice to the other, may apply to the Chief Judge

of the United States District Court for the District of Minnesota for the appointment of a third arbitrator.

Article VII, *Assignment*, paragraph A, should read as follows:

VII.

Assignment

A. All rights, duties and privileges recognized or granted hereunder are exclusively the property of the Band pursuant to the delegation and assignment from the Minnesota Chippewa Tribe and not of any individual member thereof.

STATEMENT

This appeal cannot be properly understood without reviewing the lengthy history of the dispute over hunting and fishing by Indians in the Leech Lake Reservation. It began in 1969 when the Leech Lake Band of Chippewa Indians brought suit in federal district court (No. 3-69 Civ. 65, D. Minn.) against the commissioner of the Minnesota Department of Natural Resources to vindicate what it believed to be its exclusive legal rights, as protected by various treaties, to hunt, trap, fish, and gather wild rice within the boundaries of the Leech Lake Indian Reservation as they had been established in the 19th Century.² The Band was subsequently joined by the United

² The Leech Lake Indian Reservation developed from three treaties and three executive orders over a period of almost 20 years. Treaty of February 22, 1855, 10 Stat. 1165, II Kappler 862; Treaty of May 7, 1864, 13 Stat. 693, II Kappler 862; Treaty of March 19, 1867, 16 Stat. 719, II Kappler 974; Executive Order of October 29, 1873, I Kappler 854; Executive Order of November 4, 1873, I Kappler 851; and Executive Order of May 26, 1874, I Kappler 852. The Minnesota Chippewa Tribe, of which the Leech Lake Band of Chippewa Indians is a component, is a federally recognized tribe organized pursuant to the Indian Reorganization Act, 25 U.S.C. § 461 et seq.

States,³ and protracted litigation followed, accompanied by considerable controversy and acrimony between the Indian and non-Indian citizens of Minnesota.

The trial before the federal district court lasted for two days. Both sides called, examined and cross-examined numerous witnesses and introduced voluminous documentary evidence culled from the National Archives, the Minnesota Historical Society, state and federal governmental records and many other sources. Both sides were represented by skilled and energetic advocates.⁴ In short, the case was well and fully tried.

One of the issues given particular emphasis by the parties and the court was the effect of the Nelson Act of January 14, 1889, 25 Stat. 642, on the status of the Leech Lake Reservation. The State's position was that the act and its implementing agreement between the United States and what is now known as the Leech Lake Band disestablished the reservation and destroyed any hunting, trapping, fishing and ricing rights the Indians may have had in the ceded lands. This position was strongly opposed by the Band and the United States. All parties resorted to the legislative history of the Nelson Act, the Northwest Indian Commission Report (S. Exec. Doc. No. 115, 49th Cong. 2d Sess. (1887)), the Rice Report (H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. (1890)),⁵ as well as other relevant reports, letters, opinions, memoranda and the like.

³ Specifically, the United States brought a parallel action (*United States v. Minnesota*, No. 3-70 Civ. 228) which was consolidated with the Band's action.

⁴ Judge Devitt, before whom the case was tried, later wrote that "a vigorous and able defense was presented by the State of Minnesota." *Leech Lake Citizen's Comm. v. Leech Lake Band of Chippewa Indians*, 355 F. Supp. 697, 699 (D. Minn. 1973).

⁵ This document contains the agreements which implemented the Nelson Act, as well as the report of the United States Commissioners and the minutes of their negotiations with the various bands of Chippewas.

In spite of its best efforts, the State lost. On December 10, 1971, Judge Devitt filed a Memorandum and Order in which, after concluding that the Leech Lake Reservation had not been disestablished by the Nelson Act, he held that:

. . . plaintiff Indians have the right to hunt and fish and gather wild rice on public lands and public waters of the Leech Lake Reservation free of Minnesota game and fish laws.

Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001, 1006 (D. Minn. 1971). However, he rejected the claim that the Band "possessed the exclusive authority to regulate fishing, hunting and ricing." *Id.* Judgment was entered accordingly on January 25, 1972.

All parties appealed from the judgment of the district court. It was not until this late stage in the proceedings that local non-Indian opponents of the Indian claims made any attempt to become involved in the litigation as parties or otherwise. After the appeals had been filed, several individual members of the so-called Leech Lake Citizens Committee, represented principally by appellant C. John Forge, attempted to intervene as parties before the Eighth Circuit Court of Appeals. Their motion was denied, but the court did grant them the right to file a brief *amicus curiae*. See, *Leech Lake Citizens' Com. v. Leech Lake Band of Chippewa Indians*, 355 F. Supp. 697 (D. Minn. 1973), which describes this sequence of events in greater detail.

Also at this appellate stage, the parties reached tentative agreement on settlement of the controversy. On the basis of this agreement the court of appeals remanded to the district court for entry of a consent judgment. The members of the Leech Lake Citizen's Committee, as well as several other per-

sons and the committee itself, again represented by appellant Forge, attempted to block the settlement by bringing suit against the parties thereto in federal district court. The district court dismissed the action. *Id.*

On January 26, 1973, the parties signed a formal Memorandum of Agreement and Settlement (hereinafter "Settlement Agreement") which was "expressly conditioned upon the adoption by the Legislature, at the 1973 session thereof, of legislation to be submitted by the Governor to effectuate the terms of this Agreement." Settlement Agreement, Art. II, ¶A. The legislature, after full hearings, at which Mr. Forge and other members of the Leech Lake Area Citizen's Committee testified,⁶ enacted the requisite legislation which was signed by the governor on April 23, 1973. Laws of Minnesota 1973, c. 124, codified as Minn. Stat. § 97.431 (1976). At about this same time the Citizen's Committee again moved to intervene, but was again denied on the grounds that its motion was not timely and that its interests had been adequately represented by the State in the original litigation. *Leech Lake Area Citizen's Committee v. Leech Lake Band of Chippewa Indians*, 486 F.2d 888 (8th Cir. 1973).

Judge Devitt then incorporated the Settlement Agreement in a Consent Judgment dated June 18, 1973, which specifically provides in Paragraph IX that:

In the event that the Memorandum of Agreement and Settlement or any portion of said Agreement or any portion of the legislation enacted pursuant to the Agreement is held void, illegal or unconstitutional by the Supreme Court of the State of Minnesota or by any Federal Court of competent and final jurisdiction, then in that event,

⁶ *State v. Forge*, Nos. 46473, 46478 and 46479 (filed October 14, 1977) at 4, Appellants' Joint Jurisdictional Statement at 88a.

this judgment shall terminate and any party may apply to this Court for a new appealable judgment consistent with the judgment entered by this Court on January 25, 1972, in this litigation.

This Settlement Agreement approved and adopted by both the Minnesota Legislature and the federal district court provides a means for protecting both the judicially recognized hunting and fishing rights of the Indians and the interest of the State in conserving its fish and game resources for all its citizens. On the one hand, it provides that "all Band and licensed Tribal members shall be exempt from State law governing hunting, fishing, trapping or ricing while within the reservation," and requires the State to collect an additional sum from all other persons who wish to hunt, fish or trap in the Leech Lake Reservation.⁷ Settlement Agreement, Art. IV, ¶¶ A and B1. But on the other hand it requires the Band to "adopt and uniformly and fairly enforce . . . upon all its members" a conservation code previously worked out by the parties. Settlement Agreement, Art. IV, ¶ A. This code was and is very similar to the State game and fish laws (*State v. Forge, supra*, at 4 n. 5, Appellants' Joint Jurisdictional Statement at 88a), and cannot "be modified, amended or altered except by each of the parties hereto or as provided herein." Settlement Agreement, Art. IV, ¶ A. Also, the Settlement Agreement provides that "in no event" would the Band "per-

⁷ The amount of this additional sum is limited to 50% of the current state license fee. Settlement Agreement, Art. IV, ¶ B.1. During the 4-1/2 years the Agreement has been in effect the Band has not exercised the full scope of this authority. From 1973 through 1977 the additional charge was \$1.00. Beginning this year it will be \$2.00, but there have been substantial increases in state license fees in the interim. See, Laws of Minnesota 1976, c. 346, § 5. Currently, for example, the fee for resident individual fishing licenses is \$5.00, while for a combination husband and wife fishing license it is \$8.00. Minn. Stat. § 98.46, subd. 2 (1976).

mit the commercial taking or sale of game fish or game." *Id.* Finally, the Band expressly waived its claim to jurisdiction over non-Indians.⁸ *Id.*

According to its terms, Minnesota Statutes, Section 97.431 and the Settlement Agreement it incorporates became effective on June 22, 1973. On that day appellants Forge, Olson and Larson, who remained opposed to the implementation of the hunting and fishing rights claimed by the Band and recognized by the federal district court, staged what has come to be known commonly as the "Leech Lake fish-in." For the purpose of challenging the constitutionality of Section 97.431, appellants, none of whom are Indians, went fishing inside the Leech Lake Reservation without having paid the additional sum required by the Settlement Agreement. They were arrested, charged with a violation of Section 97.431 and ultimately found guilty by both the county and district courts of Cass County. In neither of those proceedings did any party seek to introduce the voluminous documentary evidence necessary to redetermine the treaty rights issues already considered and determined by the federal district court in *Leech Lake Band of Chippewa Indians v. Herbst, supra*. The State, for its part, consistently maintained that those issues were already finally determined by the federal court, that the Indian rights must be recognized and that the sole issue confronting the state courts was whether, given the existence of such rights, Section 97.431 was constitutional.

The state district court, however, undertook to review the entire hunting and fishing rights issue on its own. Relying

⁸ Pursuant to Article IV, ¶ A of the Settlement Agreement, non-Indians remain subject to state law rather than the band conservation code. As a result non-Indians who commit game or fish violations in the reservation are tried in state courts.

entirely on materials outside the record and without the benefit of a hearing on these issues, that court produced the voluminous memorandum included as an appendix to appellants' Joint Jurisdictional Statement. The reasoning and conclusions of that memorandum are in direct conflict with the court's specific Findings of Fact and Conclusions of Law. *Infra* at A-1. The judgment entered pursuant to these findings and conclusions affirmed the convictions entered by the county court.

On appeal the Minnesota Supreme Court upheld Section 97.431 and hence the convictions. In so doing the Court characterized the statute as "a rational compromise" between the rights of the Indians and "the legitimate interest of the State of Minnesota to regulate fishing within its borders." *State v. Forge, supra*, at 2, Appellants' Joint Jurisdictional Statement at 85a.

The results achieved by the statute and the incorporated Settlement Agreement fully justify this conclusion. During the 4-1/2 years that this case has been moving through the courts, the conservation and enforcement mechanisms have been working efficiently and effectively. The Band has developed an admirable law enforcement program. With the help of the state and federal governments, the Band has employed, equipped, and trained a force of six conservation officers. It has established a conservation court consisting of a judge, a clerk and a prosecuting attorney. A close working relationship has developed between state and band law enforcement officers. Tensions between Indians and non-Indians in the area have been reduced, and the threat of violence, which was real and imminent prior to the implementation of the Settlement Agreement has receded. Unrestricted state hunting and fish-

ing licenses⁹ have become well-established. Department of Natural Resources records indicate that the Band's receipts from this source have averaged about \$250,000 per year through 1977. Most importantly, the predictions that game and fish populations and the wild rice crops would suffer have proven groundless. The compromise has proven not only rational but successful.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court.

I. IN MORTON v. MANCARI, 417 U.S. 537 (1974), THIS COURT HAS ALREADY ESTABLISHED THAT STATUTES, LIKE MINNESOTA STATUTES, SECTION 97.431, WHICH SINGLE OUT INDIANS FOR PARTICULAR AND SPECIAL TREATMENT DO NOT DENY NON-INDIANS THE EQUAL PROTECTION OF THE LAWS.

Appellants' primary claim is that Minnesota Statutes, Section 97.431, denies non-Indians the equal protection of the laws by recognizing the exemption of members of the Leech Lake Band of Chippewa Indians from state game and fish laws and by requiring non-members to pay an additional fee over and above the basic state license fee for the privilege of hunting, trapping or fishing on the Leech Lake Reservation.¹⁰ But this statute merely recognizes a right which the federal district court found to exist under federal law and attempts to reconcile that right with the interests of the state.

⁹ These include the additional sum for engaging in those activities in the Leech Lake Reservation.

¹⁰ Appellants' Joint Jurisdictional Statement at 19.

Because the special treatment afforded to Indians by Section 97.431 is rationally related to the effectuation of the unique rights possessed by those Indians under federal law and, further, to the reconciliation of those rights with the interests of the state, this case is indistinguishable from *Morton v. Mancari*, 417 U.S. 535 (1974). There, the issue was whether the preference in Bureau of Indian Affairs employment afforded to Indians by Section 12 of the Indian Reorganization Act, 25 U.S.C. § 472, violated the equal protection rights of non-Indian employees. This Court held that it does not. Mr. Justice Blackmun, writing for a unanimous Court, emphasized the "numerous occasions" on which the Court "specifically has upheld legislation that singles out Indians for special treatment," and concluded that "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Morton v. Mancari*, *supra*, at 555-56. See also, *United States v. Antelope*, — U.S. —, 97 S.Ct. 1395, 1398-99 (1977); *Fisher v. District Court*, 424 U.S. 382 (1976); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Res.*, — U.S. —, 96 S.Ct. 1634, 1644 (1976).

Now if the federal government may enact laws or enter into treaties which create or preserve unique Indian rights without raising equal protection issues in respect to non-Indians, then surely, assuming there is no state constitutional prohibition, a state may recognize those rights and take reasonable steps to minimize adverse impacts on state interests, also without encountering equal protection problems. That is precisely the situation here.

The Leech Lake Band of Chippewa Indians brought suit against the State of Minnesota alleging that the Band pos-

sesses unextinguished rights to hunt, trap, fish and gather wild rice in their reservation free of state regulations. The state "argued on behalf of all Minnesota citizens that the Indians were not immune from fish and game laws." *State v. Forge*, *supra*, at 10, Appellants' Joint Jurisdictional Statement at 95a. The federal district court after a full trial on the merits held in favor of the Indians.¹¹ *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (D. Minn. 1971).

The right recognized by the federal court, while not exclusive, was otherwise unrestricted. It left the Indians free to utilize the fish, game and wild rice on the reservation as they saw fit. The Band could impose as little or as much regulation as it deemed desirable. It had the power to adopt policies that would damage or destroy these valuable resources to the detriment of all of the people of the state. For example, the Band might have decided to engage in large scale commercial fishing for walleyed pike or other species of game fish. Or it might have allowed unregulated taking by Band or Tribal members. Whatever the Band chose to do, regardless of how injurious to the interests of other citizens of the state, the state was powerless to protect those interests.

Obviously, the state had a strong interest in insuring that the Band adopted responsible restrictions on the exercise of its hunting and fishing rights. The Settlement Agreement ap-

¹¹ Regardless of whether Appellants were, or should have been, precluded from relitigating the hunting and fishing rights question in the state courts after it had been determined by the federal district court in an action in which the state was a party, it is clear that the record now before the Court is inadequate for a proper presentation of that complex issue. As noted previously, none of the historical materials necessary to a determination of whether the Leech Lake Band has hunting and fishing rights are a part of the record here. *Supra* at 14-15. Therefore, under the doctrine of *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947), the Court should not consider this issue in any event.

proved by Minnesota Statutes, was the means to this end. As noted previously, the Band agreed to several significant limitations on its rights and waived its claim to jurisdiction over non-Indians.¹² In return the state agreed to collect, on behalf of the Band, an additional fee from non-Indians who wished to hunt, trap or fish in the reservation. Essentially, the Agreement provides compensation to the Band for not exercising its rights to the full extent, and those who benefit the most, namely non-Indian sportsmen, bear most of the burden of providing that compensation.

The Settlement Agreement is no more than a reasonable and proper response by the state to existence and implications of the rights recognized by the federal court in *Leech Lake Band of Chippewa Indians v. Herbst*, *supra*. Since those rights have been determined to exist, this kind of response cannot be attacked by non-Indians on equal protection grounds. As the Minnesota Supreme Court put it:

The practical effect of this agreement was to preserve the valuable fishing resources found at Leech Lake while at the same time giving recognition to and compensation for historic treaty rights held by the Band. We therefore hold that the classifications created under §§ 97.431 were rationally related to resolving the competing claims advanced by the parties in Leech Lake I [i.e. *Leech Lake Band of Chippewa Indians v. Herbst*, *supra*].

State v. Forge, *supra*, at 10, Appellants' Joint Jurisdictional Statement at 95a - 96a.

¹² *Supra* at 15.

II. IN UNITED STATES v. MAZURIE, 419 U.S. 544 (1975), THIS COURT EXPRESSLY HELD THAT INDIAN TRIBES ARE GOVERNMENTAL BODIES TO WHICH CERTAIN DISCRETIONARY POWERS MAY BE DELEGATED.

Appellants argue that such delegation of power as the Minnesota legislature made to the Leech Lake Band by enacting Minnesota Statutes, Section 97.431, and thereby adopting the Settlement Agreement ought to be struck down as a grant of legislative power to a "non-governmental unit."¹³ This, they assert, would deny equal protection to non-members of the Band.

This argument is based upon a fundamental misunderstanding of the political status of Indian tribes. The nature of this error was clearly explained by this Court in *United States v. Mazurie*, 419 U.S. 544 (1975). There, the respondents, a non-Indian couple who operated a bar on their own land inside the Wind River Reservation, claimed that Congress could not delegate to the Wind River Tribes the authority to require them to obtain a tribal liquor license. The court of appeals had agreed, stating, "Congress cannot delegate its authority to a private, voluntary organization, which is obviously not a governmental agency. . . ." *United States v. Mazurie*, 487 F.2d 14, 19 (10th Cir. 1973).

This Court rejected that view. After reviewing the leading cases on tribal sovereignty, it concluded that "Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.'" *United States v. Mazurie*, 419 U.S. 544, 557 (1975). They are instead, "entities which

¹³ Appellants' Joint Jurisdictional Statement at 25.

possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life." *Id.* This authority "is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority 'to regulate Commerce . . . with the Indian tribes. . . .'" *Id.*

If Congress can delegate such extensive discretionary powers to Indian tribes, there can be no question about the much more limited delegation made by Minnesota Statutes, Section 97.431. The Settlement Agreement approved by that statute "restricts the Band from setting the special licensing fee in excess of 50 percent of the state resident fee" *State v. Forge, supra*, at 11, Appellants' Joint Jurisdictional Statement at 97a. Again, the need to protect state interests from the possible adverse results of *Leech Lake Band of Chippewa Indians v. Herbst, supra*, provides ample justification for this limited delegation of powers.¹⁴

Appellants also suggest in this portion of their Joint Jurisdictional Statement (p. 25) that the constitution prohibits the states from entering into agreements with Indian tribes, whether for the purpose of settling lawsuits brought by the Indians and the United States (as in this situation) or for any other purpose without the specific consent of congress. Apparently, the argument is that absent congressional involve-

¹⁴ Even if *Mazurie* were ignored, the scope of discretion delegated to the Leech Lake Band by Minnesota Statutes, Section 97.431, is so narrow that no substantial delegation issue can be raised. The legislature has set the basic policy and made the crucial choices. The Band merely makes limited choices within the legislative framework. See, *Yakus v. United States*, 312 U.S. 414, 423-27 (1944).

ment, such agreements *per se* would interfere with the power of congress to "regulate commerce . . . with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3.

But there is no such blanket constitutional prohibition against such agreements. Congressional power over matters involving Indians is pre-emptive rather than exclusive. The states remain free to act (especially where non-Indians are involved) so long as such actions do not "infringe on the right of reservation Indians to make their own laws and be governed by them" (*Williams v. Lee*, 358 U.S. 218, 220 (1959)), or conflict with federal laws or treaties (*United States v. McGowan*, 302 U.S. 535, 539 (1938)). See also, *McClanahan v. State Tax Comm'n. of Arizona*, 411 U.S. 164, 172 (1973). Here an agreement was entered into by the United States, the Indians and the State to reconcile competing legal claims. Under the circumstances it is clear that this agreement is wholly consistent with federal Indian policy and with the principles of Indian self government. In any event, in section 16 of the Indian Reorganization Act, 25 U.S.C. § 476, congress specifically empowered tribes organized thereunder "to negotiate with the Federal, State and Local Governments."

CONCLUSION

For the reasons discussed above the State of Minnesota respectfully submits that the question raised by Appellants herein is so unsubstantial as not to need further argument. Therefore, the State respectfully moves the Court to dismiss this appeal or in the alternative, to affirm the judgment entered in this matter by the Supreme Court of Minnesota.

Respectfully submitted,

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APPENDIX

STATE OF MINNESOTA

County of Cass

IN DISTRICT COURT

Ninth Judicial District

STATE OF MINNESOTA,

Plaintiff,

vs.

C. JOHN FORGE, JAMES OLSON,

RICHARD C. LARSEN,

Defendant.

The above-entitled matters came on for trial before the Honorable James F. Murphy, deceased, without a jury, by consent of all parties, in the Courthouse, in the City of Walker, County of Cass and State of Minnesota, on the 19th day of September, 1973, on appeal from the County Court of Cass County, Minnesota; in which the Honorable Keith L. Kraft, a non-lawyer County Judge of Cass County, Minnesota, found the defendants guilty of violating Chapter 124 of the Laws of the State of Minnesota for the year 1973, now being M.S.A. 97.431. Mr. Robert Carolan, Assistant Attorney General, Mr. Michael J. Haas, Assistant Cass County Attorney, appeared in behalf of the State of Minnesota. Mr. C. John Forge, Jr., appeared pro se, Mr. James Olson appeared pro se, and Mr. Richard C. Larsen consented that any decision herein shall be binding upon him the same as if he had personally appeared before the Court. In addition thereto the Court allowed Attorney C. John Forge, Jr., to appear, although he is not admitted to practice before the Courts in the State of Minnesota, but is a duly qualified, licensed and practicing attorney in the

State of Missouri. In addition thereto Mr. George Cardinal has filed a brief amicus curiae in behalf of the defendants.

That due to the death of the Honorable James F. Murphy, before a decision was rendered herein, the parties hereto and in open court in August of 1974, agreed to submit the matter to the undersigned based upon the transcript of the proceedings herein before held, and upon such additional argument, memorandum, and files and records agreed upon by the parties to be furnished to the Court. That all matters now having been submitted to the Court and after due consideration of all the files and records herein, the Court makes the following:

FINDINGS OF FACT

1. That C. John Forge, Jr., is a resident of the State of Missouri. That James Olson is a resident of St. Paul, Ramsey County, Minnesota. That Richard C. Larsen is a resident of Cass County, Minnesota.

2. That on June 22, 1973, between the hours of 8:00 and 9:00 o'clock P.M., the defendants were fishing within the boundaries of the Leech Lake Reservation, better known for the purpose of this hearing as Leech Lake Settlement Area. That at said time each of said defendants possessed a valid fishing license issued by the State of Minnesota for the year 1973, but that said defendants had not obtained a special license relating to license fees for persons who are not members of the Minnesota Chippewa Tribe for the privilege of fishing within the reservation heretofore mentioned.

3. That none of the defendants are members of the Minnesota Chippewa Tribe.

4. That defendants contend that Chapter 124 of the Laws of Minnesota for the year 1973 is unconstitutional and, therefore, they are not guilty of any crime, but admit that they were violating said law if said law is held to be constitutional.

And from the foregoing, the Court makes the following:

CONCLUSIONS OF LAW

1. That each of the defendants be and he is herewith found guilty of violating Chapter 124 of the Laws of Minnesota for the year 1973, now coded as M.S.A. 97.431, and that each of said defendants be and he is herewith sentenced to pay a fine in the sum of Twenty Dollars (\$20.00), that being the fine set by the lower court, and that upon the failure to pay said fine that said defendant be and he is herewith sentenced to imprisonment in the Cass County Jail for a period of two (2) days.

IT IS ORDERED that the payment of the fine or the imprisonment imposed herein be and the same is herewith stayed during the time necessary for the taking of an appeal to the Supreme Court of the State of Minnesota and that pursuant to Rule 29.02, Subdivision 6 (4) the defendants are granted an additional thirty day period within which to seek permission from the Supreme Court of the State of Minnesota to appeal the conviction herein.

IT IS FURTHER ORDERED that if no appeal is taken within the time for taking said appeal that the fine shall be ordered paid forthwith thereafter or the imprisonment ordered served.

Let the attached memorandum be made a part hereof.

Dated this 7th day of November, 1975.

By the Court:

JAMES E. PREECE

Judge of the District Court